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No. 283

In the Supreme Court of the United States

OCTOBER TERM, 1935

BALTIMORE NATIONAL BANK, PETITIONER

v.

STATE TAX COMMISSION OF MARYLAND, RESPONDENT

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF MARYLAND

BRIEF ON BEHALF OF THE RECONSTRUCTION FINANCE CORPORATION AS AMICUS CURIAE

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BRIEF ON BEHALF OF THE RECONSTRUCTION FINANCE CORPORATION AS AMICUS CURIAE

STATEMENT

The Baltimore National Bank was incorporated with the aid of the Reconstruction Finance Corporation, which pursuant to the provisions of Section 304 of the Act of March 9, 1933, subscribed to and purchased an issue of the preferred stock of the bank (R. 25, 26). The State of Maryland has assessed a tax on the shares of stock (R. 22). Under

the provisions of Section 15 (e) of Article 81 of the Maryland Code, as amended by ch. 226, sec. 15, Laws of 1929, the shares—

> shall be taxed to the several owners thereof, and the tax thereon shall be debts of such owners, but may be collected in each case from the bank or other corporation, which shall be bound to pay the same for account of its stockholders whether or not dividends are declared thereon, as if such corporations were the ultimate taxpayer, but may obtain reimbursement therefor from the respective stockholders, and may charge the same in reduction of any amounts due to the several shareholders as dividends or otherwise.

Such a tax is a tax upon the stockholder. *Domenech* v. *National City Bank,* 294 U. S. 199; *Des Moines* v. *Fairweather,* 263 U. S. 103; *First National Bank* v. *Chehalis,* 166 U. S. 289. Although it is payable in the first instance by the bank, it is recoverable from the stockholder, in this case the Reconstruction Finance Corporation. The Reconstruction Finance Corporation is, therefore, directly interested in a determination of this case. The Reconstruction Finance Corporation is further interested in the question here presented because it has similar preferred stock holdings in national banks located in states where similar taxing statutes may be found.

SUMMARY OF ARGUMENT

In the absence of consent by Congress, property acquired and held by the Reconstruction Finance Corporation, a corporate instrumentality of the United States, in the performance of governmental functions, is not subject to state taxation. The national bank stock here involved was so acquired and so held. It is therefore exempt from taxation by the states in the absence of congressional consent. A further ground of exemption is found in the fact that national banks are government instrumentalities.

Congress has not consented to the taxation of national bank stock held by the Reconstruction Finance Corporation. No such consent is found in Section 5219 and in fact is specifically withheld in Section 10 of the Act creating the Reconstruction Finance Corporation.

ARGUMENT

POINT ONE

THE SHARES OF NATIONAL BANK STOCK HERE INVOLVED ARE NOT SUBJECT TO STATE TAXATION UNDER THE FEDERAL CONSTITUTION APART FROM CONGRESSIONAL CONSENT

(A) *Shares of national bank stock acquired and held by the Reconstruction Finance Corporation, a corporate instrumentality of the United States, in the exercise of governmental functions, are not subject to State taxation apart from congressional consent*

1. The immunity of the means and instrumentalities of the federal government from state taxation was established, in connection with a corporate instrumentality of the United States, in *McCulloch* v. *Maryland,* 4 Wheat. 316. It has been described in *Johnson* v. *Maryland,* 254 U. S. 51, by Mr. Justice Holmes, at page 55–56, as follows:

> Here the question is whether the state can interrupt the acts of the general government itself. With regard to taxation, no matter how reasonable, or how universal or indiscriminating, the state's inability to interfere has been regarded as established since *McCulloch* v. *Maryland,* 4 Wheat. 316. The decision in that case was not put upon any consideration of degree, but upon the entire absence of power on the part of the states to touch, in that way, at least, the instrumentalities of the United States (4 Wheat. 429, 430), and that is the law today.

It has been restated on numerous occasions. See e. g., *Metcalf and Eddy* v. *Mitchell,* 269 U. S. 514, 524; *Fox Film* v. *Doyal,* 286 U. S. 123, 128; and recently in *Trinity Farm Construction Co.* v. *Grosjean,* 291 U. S. 466, Mr. Justice Butler said at page 471:

> * * * it [appellant] seeks to invoke the rule that, consistently with the Federal Constitution, a State may not tax the operations of an instrument employed by the government of the Union to carry its powers into operation. That principle, while not expressly stated in the Constitution, necessar-

> ily arises out of our dual government. It has often been given effect. And reciprocally it safeguards every State against federal tax on its governmental agencies or operations. Its application does not depend upon the amount of the exaction, the weight of the burden or the extent of the resulting interference with sovereign independence. Where it applies, the principle is an absolute one wholly unaffected by matters or distinctions of degree. *Indian Motorcycle Co.* v. *United States,* 283 U. S. 570, 575, 75 L. ed. 1277, 1281, 51 S. Ct. 601, and cases cited. Its right application is essential to the orderly conduct of the national and the state governments and the attainment of justice as between them.

Accordingly, this court held that property, that was owned by a corporate instrumentality of the United States and was used in the exercise of a governmental function, was immune from state taxation. *Clallam County* v. *U. S.,* 263 U. S. 341.[1] That case involved the United States Spruce Corporation which was organized under state law, pursuant to Congressional authorization, as an instrumentality for carrying on the war. The funds of the corporation were supplied by the United States

[1] This ruling was anticipated in *King County* v. *U. S. Fleet Corporation*, 282 Fed. 150 and *U. S. Spruce Production Corporation* v. *Lincoln County*, 286 Fed. 200, and has been followed in *U. S. Fleet Corporation* v. *Delaware*, 17 Fed. (2d) 40 and *Port Angeles Western R. Co.* v. *Clallam County*, 20 Fed. (2d) 202. The U. S. Fleet Corporation, here involved, was organized in a manner and for the purposes substantially similar to the U. S. Spruce Production Corporation.

and all its stock was beneficially owned by it. Mr. Justice Holmes in delivering the opinion of the court, said:

> The state claims the right to tax on the ground that taxation of the agency may be taxation of the means employed by the government, and invalid upon admitted grounds; but that taxation of the property of the agent is not taxation of the means. We agree that it "is not always, or generally, taxation of the means," as said by Chief Justice Chase in *Thomson* v. *Union P. R. Co.*, 9 Wall. 579, 591, 19 L. ed. 792, 798. But it may be, and, in our opinion, clearly is, when, as here, not only the agent was created, but all the agent's property was acquired and used, for the sole purpose of producing a weapon for the war. This is not like the case of a Corporation having its own purposes as well as those of the United States, and interested in profit on its own account. The incorporation and formal erection of a new personality was only for the convenience of the United States, to carry out its ends (263 U. S. 344–45).

More recently this court has reaffirmed the *Clallam* case in *New Brunswick* v. *U. S.*, 276 U. S. 547. That case involved the United States Housing Corporation, which was similar to the Spruce Production Corporation in organization and purpose. The court permitted a property tax to be assessed against the purchaser of the Corporation's realty, but held that the Housing Corporation's secured interest was not subject to the lien for taxes as-

sessed by the City of New Brunswick. As pointed out by the court at pp. 555–556:

> It is unquestioned that so long as the corporation held title to the lots as an instrumentality of the United States and solely for its use and benefit, they were not subject to taxation by the city. *Clallam County* v. *United States,* 263 U. S. 341. * * * [And the Housing Corporation's security interest] being held by the corporation for the benefit of the United States, is paramount to the taxing power of the state and cannot be subjected by the city to sale for taxes.

2. The Reconstruction Finance Corporation is likewise a corporate instrumentality of the United States, and the preferred stocks of banks, acquired in the exercise of governmental powers for a public purpose, are likewise immune from State taxation.

The Reconstruction Finance Corporation was created by the Act of Congress of January 22, 1932 (15 U. S. C. A. § 601 ff). Its capital was supplied, and its stock is held, solely by the United States. Additional funds likewise have been supplied by the United States. The moneys of the Corporation are deposited with the Treasurer of the United States. Upon its liquidation any remaining balance is to be paid into the Treasury of the United States. The Corporation is authorized to act as depositary of public moneys. Its directorate consists of the Secretary of the Treasury, or in his absence the Undersecretary of the

Treasury, and six other directors appointed by the President of the United States by and with the advice and consent of the Senate. Declarations in the Act itself,[2] in the Senate Report on the Act,[3] in the House Committee hearings,[4] and before Congress by the sponsors of the Act [5] uniformly reveal that the Corporation was intended to give temporary financial aid to distressed financial institutions, railroads, and agricultural and industrial organizations in an effort to better the depressed financial and business conditions throughout the country. Recent decisions have affirmed the governmental nature of these functions. Thus the court, in *Langer* v. *U. S.*, 76 F. (2d) 817, said at page 823:

> We conclude that this corporation was a direct agency for furthering and carrying out powers conferred upon the federal government by the Constitution * * *.

See also *U. S.* v. *Lewis,* 10 Fed. Supp. 471; *Reconstruction Finance Corporation* v. *Krauss,* 12 Fed. Supp. 44; *Opinion of the Justices,* 177 Atl. (Maine) 897.

The authorization to the Reconstruction Finance Corporation contained in Section 304 of the Act of March 9, 1933 (Public No. I, 73d Congress), to ac-

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[2] Sections 2 and 5 and as amended, 15 U. S. C. A. § 602 and § 605.

[3] Senate Report #33, 72d Congress, First Session, p. 2.

[4] Hearings Before House Committee on Banking and Currency, 72d Congress, 1st Session, on H. R. 5060 and 5116, pp. 10–15.

[5] Congressional Record, 72d Congress, First Session, pages 1418, 1419.

quire preferred stock in banks was directed toward this end. In the Act "Congress hereby declares that a serious emergency exists and that it is imperatively necessary speedily to put into effect remedies of uniform national application."

The Act was passed at a time of increasing bank failures and diminishing bank capital. In the language of the Twentieth Annual Report of The Federal Reserve Board for the year 1933:

> Between the end of December 1929 and the end of February 1933 nearly 5,500 banks, or more than one bank in every five, suspended operations, with deposit liabilities aggregating about $3,500,000,000. (P. 3.)
>
> During the same period [1930, 1931, 1932] the decline in the net deposits of member banks approximated $7,000,000,000, or about $1,500,000,000 less than that shown in loans and investments, the difference reflecting largely a substantial decrease in the capital, surplus, and undivided profits of the banks that arose to a large extent from losses sustained in consequence of declines in asset values. (P. 4.)

The success of the governmental operations under the Act was immediate.

> A number of the member banks that were licensed to reopen at the conclusion of the banking holiday, and many of those that were licensed later in the year, were strengthened in some way before they were licensed, chiefly with new capital supplied by local interests or with funds from the Re-

construction Finance Corporation. After being reopened, furthermore, a considerable number of banks were strengthened through additions to their capital. Some additions were made in the second and third quarters of the year, but most of them were made in the past quarter when banks in large numbers were being fortified with funds from the Reconstruction Finance Corporation for entrance at the end of the quarter into the Federal deposit insurance fund. (P. 22).

The policy followed by the Secretary of the Treasury in reopening banks after the banking holiday, together with the steps to strengthen member banks subsequently taken in cooperation with the Reconstruction Finance Corporation, was reflected in the fact that but 15 of the approximately 6,000 member banks reopened were obliged to suspend operations during the remainder of the year. (P. 26, Federal Reserve Board Reports, *supra.*)

The Reconstruction Finance Corporation cannot purchase the preferred stock of national banks of its own initiative. In the words of Senator Glass, the purchases may be made only "upon the initiative of the Secretary of the Treasury and the approval of the President * * *." (Congressional Record, Volume 77, Part 1, Page 56.) At the time of the Secretary's request to the Reconstruction Finance Corporation to subscribe for the preferred stock he must be of the opinion that the bank is in need of "funds for capital purposes", either in connection with its organization or re-

organization. As a consequence, the Reconstruction Finance Corporation could not act as investor or *entrepreneur*. It was authorized to act only when the need of banks for capital funds made its intervention necessary to safeguard and strengthen the banking system[6] and then only when the approval of the Chief Executive and the chief fiscal officer of the United States had been procured. And the preferred stock was the means employed in carrying out the Congressional purposes.

The situation here is strikingly similar to that described by Mr. Justice Brandeis:

> These appropriations were made in order to meet a pressing need. At the time of the passage of Transportation Act, 1920, most of the railroads of the United States lacked funds for necessary improvements, equipment, and expansion of facilities. Some of the carriers needed funds, also, to meet maturing obligations. The credit of many carriers was seriously impaired. There was

[6] The Chairman of the Reconstruction Finance Corporation, appearing at the hearing on H. R. 4240 (S. 1175) before the Committee on Banking and Currency of the House of Representatives, 74th Congress, 1st Session, January 21, 1935 (p. 4), said: " * * * we have endeavored to do the banking repair work on as sound a basis as possible. We have not been as generous probably as some people wanted us to be, but it has been our thought that the best thing that we could do for any bank, or any community, was to get as much local interest, as much local ownership in that bank as possible, and we have required, in many instances, the raising of additional funds locally, and, very often, when people felt that we were probably unnecessarily severe."

a general reluctance among investors to purchase new railroad securities even of the strongest railroads. Congress deemed it important to preserve for the nation substantially the whole existing transportation system. Compare *New England Divisions Case* (*Akron, C. & Y. R. Co.* v. *United States*) 261 U. S. 184, 190, 67 L. ed. 605, 609, 43 Sup. Ct. Rep. 270. In order to accomplish this it was thought necessary that the United States should, to a certain extent, finance the carriers until it would become possible to restore their credit, by increase of rates or otherwise. The provisions of title II of Transportation Act 1920 were framed to that end. Through them, the financial aid which had been given during Federal control was to be extended for a further period. (*United States* v. *Guaranty Trust Co.*, 280 U. S. 478, 484–485.)

The governmental nature of the preferred stock here involved appears for a further reason. Since *McCulloch* v. *Maryland*, 4 Wheat. 316, this court has frequently declared financial institutions that have been created pursuant to Congressional authority, to be governmental instrumentalities "engaged in the performance of important governmental functions." *Federal Land Bank* v. *Priddy*, decided April 29, 1935, 295 U. S. (prelim. print.) 229. Their immunity from taxation, apart from Congressional consent, has also been declared. *Federal Land Bank* v. *Priddy, supra*, at pp. 234–235; *Smith* v. *Kansas City Title and Trust Company*, 255 U. S.

180; *Federal Land Bank* v. *Crossland,* 261 U. S. 374. Thus, it is now well recognized that national banks are governmental instrumentalities. Although, in contrast to the Reconstruction Finance Corporation, they are supplied with private capital and are privately owned, their operations, property, income, and shares may not be taxed by the states, apart from Congressional permission. *Union Bank and Trust Company* v. *Phelps,* 288 U. S. 181. *First National Bank* v. *Anderson,* 269 U. S. 341; *Des Moines National Bank* v. *Fairweather,* 263 U. S. 103; *Owensboro National Bank* v. *Owensboro,* 173 U. S. 664. It would seem necessarily to follow that the operations and property of the Reconstruction Finance Corporation, in extending governmental aid to them, are no less governmental and no less immune.

3. The court below relied heavily on several cases that concern federal taxation of the activity of states in the exercise of their reserved powers. *Helvering* v. *Powers,* 293 U. S. 214; *Ohio* v. *Helvering,* 292 U. S. 360; *South Carolina* v. *U. S.,* 199 U. S. 437. The court did not undertake to explain their relevancy where the activity involved is that of a government of enumerated, not reserved, powers.[7] However, assuming without conceding their relevancy, they are not controlling. In the words of the court in these cases, elevated railways and

[7] Willoughby, The Constitution of the United States (1929) 130, 164; Cooley, Constitutional Limitations, 8th Ed. vol. 1, pp. 11 and 66.

the liquor dispensaries, with which these cases dealt, involve a "business enterprise" and "non-governmental functions." These enterprises are in contrast with the recognized governmental fiscal powers discussed above. As a further distinction it should be noted that the tax here involved is levied upon the exercise of the fiscal powers. Cf. *South Carolina* v. *U. S. supra,* at p. 452, 458–60.

It was stated in the *Powers* case, as a limitation upon tax immunity, that "the state cannot withdraw sources of revenue from Federal taxing powers by engaging in business which constituted a departure from usual governmental functions." The prohibition so expressed is inapplicable to these facts. As has already been shown, since 1819 it has been recognized that the United States, in the exercise of the federal fiscal powers, may regulate and participate in the capitalization of nationally chartered banks and that such activity enjoys tax immunity. The acquisition by the Reconstruction Finance Corporation of preferred stock in national banks has also been shown to be such governmental function. To hold that the preferred stock acquired by the Reconstruction Finance Corporation is immune from State taxation would, therefore, not constitute a withdrawal of any source of revenue from the States, since they never possessed the right to tax such activity.[8]

[8] The acquisition of preferred stock by the Reconstruction Finance Corporation did not reduce the value of the banks' assets allocable to the other shareholders. Since the amount of taxes payable by the other shareholders is based upon the value of the assets so allocated to them (Michie, Banks and

The court below stressed the corporate form of the Reconstruction Finance Corporation. But it is well established that the use of a government corporation is not a waiver of constitutional immunity from taxation. *McCulloch* v. *Maryland, supra; Clallam County* v. *U. S., supra,* where the court said, at page 345:

> The incorporation and formal erection of a corporation was only for the convenience of the United States to carry out its ends.

In stressing the use of the preferred stock by the Reconstruction Finance Corporation, the court below overlooked the rule that the precise method in which Congress seeks to achieve its ends is not material. See *Helvering* v. *Powers, supra,* at page 226, also *Clallam County* v. *U. S., supra,* where the Spruce Corporation actually purchased aircraft material, and *Indian Territory Illuminating Oil Company* v. *Oklahoma,* 240 U. S. 522, where this court held invalid a tax levied by the State of Okla-

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Banking, Vol. 8, § 39f (1) and (2), pp. 235–238), it necessarily follows that the States have suffered no diminution in revenue because of the Reconstruction Finance Corporation's activities. The Reconstruction Finance Corporation has supplied *additional* capital, represented by preferred stock, and it has been its policy to do so only when funds were not available from private sources. (See Hearings on H. R. 4240 (S. 1175) before House Committee on Banking and Currency, 74th Congress, 1st Session, p. 4, quoted in part in footnote 6, *supra*). It is apparent that sufficient private capital is unavailable at such times. 20th Annual Report of the Federal Board for the year 1933, pp. 1 to 26; *United States* v. *Guaranty Trust Company, supra,* pp. 11 and 12.

homa against a corporation, the principal business of which was the development of oil and gas leases covering Osage Indian lands. In fact, since *McCulloch* v. *Maryland, supra,* and *Osborne* v. *United States Bank,* 9 Wheat. 738, it is established that stock may be acquired and held in the performance of a governmental function. Cf. *Federal Intermediate Credit Bank* v. *Mitchell,* 277 U. S. 213. See Brief of Baltimore National Bank, pages 14 to 22. The immunity of securities so acquired and so held was squarely presented to this court in *U. S.* v. *Baltimore and Ohio Railroad Co.,* 84 U. S. 322. The City of Baltimore "with a view to its commercial prosperity, was desirous of aiding in the construction of a railroad, by which the commerce and business of the western states would be brought to that City" and so acquired the securities of a railroad. A federal tax upon the interest payable to the City of Baltimore was declared invalid.

(B) *The shares of stock of national banks, as well as their operations, property, and income, are not subject to State taxation apart from congressional consent*

It has already been pointed out that the operations, property, and income of national banks are immune, under the Federal Constitution, from State taxation, apart from Congressional permission. It has similarly been pointed out that the shares of stock of national banks enjoy the same immunity. See *supra* pp. 11 and 12. Any tax in

excess of, or not in strict conformity with, such Congressional permission is absolutely void. Accordingly, in *Union Bank & Trust Company* v. *Phelps,* 288 U. S. 181, 186, this court stated:

> the several states lack power to tax National bank shares except as expressly permitted by Congress.

It follows that the shares of national bank stock here involved are not subject to state taxation under the Federal Constitution apart from Congressional permission.

Point Two

CONGRESS HAS NOT CONSENTED TO THE TAXATION OF NATIONAL BANK STOCK HELD BY THE RECONSTRUCTION FINANCE CORPORATION

(A) *Revised Statutes Section 5219 does not apply to national bank stock acquired and held by the Reconstruction Finance Corporation in the performance of governmental functions*

Consent has been given by Congress in R. S. 5219, 12 U. S. C. A. 548, to the taxation by the several states of "all shares of national banking associations." The lower court held that this section constituted a waiver by Congress of all the immunities from state taxation which the shares of stock in national banks held by the Reconstruction Finance Corporation would otherwise possess. It is submitted that such an interpretation of Section 5219 does violence to the plain intent and purpose of that statute.

Section 5219, enacted originally in 1864, was designed to remove the special tax advantages previously enjoyed by national banks in order that national and state banks might do business on equal terms.[9] For instance, had such a statute not been adopted, the State banks would have been at an obvious disadvantage in competing with national banks for stock subscriptions.

If Section 5219 effects a waiver of Reconstruction Finance Corporation's immunity from State taxation of national bank stock, and the Reconstruction Finance Corporation remains exempt from taxation on State bank stock, a statute which was intended to secure equal treatment for State and national banks would be construed to give the former priority. Such a construction cannot be implied, for it is in direct conflict with the Congressional intent to place state and national banking institutions on a basis of equality.

Bank of Redemption v. *Boston,* 125 U. S. 60, and other similar cases relied upon by the court below, are consistent with these views. There this court held that national bank stock owned by another national bank was taxable in the hands of the latter bank as owner. A contrary decision would have thwarted the Congressional intent to place national and State banks on a basis of competitive equality by giving to national banks an immunity from tax-

[9] Lutz, H. L., The Evolution of § 5219, U. S. Revised Statutes, 12 National Tax Associations, 205, 211 (1927–28); *Boyer* v. *Boyer*, 113 U. S. 689, 691.

ation on shares held by another national bank, while State banks holding such shares would remain taxable thereon as owner. Apparently in recognition of such special circumstances presented in that case, the court limited its decision to the "particular instance" under consideration (125 U. S. at p. 70).

The national bank involved in that case, to apply the language of Mr. Justice Holmes, was a "corporation having its own purposes as well as those of the United States, and interested in profit on its own account" (*Clallam County* v. *U. S.*, 263 U. S. 341). The shares held by that bank were ordinary investments and the ultimate burden of the tax would fall upon private individuals as stockholders of that bank. Such circumstances were envisaged at the time Section 5219 was enacted.[10] What was not forseen or contemplated, however, was the subsequent creation of a government corporation, wholly owned by the United States, that would acquire and hold shares of national bank stock in the exercise of governmental powers for a public purpose without competing with state banking institutions. Congress could never have intended that such an institution should be subjected to the payment of State taxes under Section 5219.

The statute was worded in general terms which granted to the legislatures of each state the power to tax "all shares of national banking associations." It is error, however, to assume, as the

[10] See brief of Baltimore National Bank, pp. 53, 54.

court below did, that such general language was intended to apply to shares of stock held by the Reconstruction Finance Corporation. Such an interpretation is at variance with the established canon of construction that the United States and its instrumentalities are not bound by the general language of a statute which tends to restrain or diminish their powers, rights, or interests unless the intent to include them clearly appears. *Brown* v. *Duchesne,* 19 How. 183, 195; *Dollar Savings Bank* v. *U. S.,* 19 Wall. 227, 239; *U. S.* v. *Herron,* 20 Wall. 251, 260; *Guarantee Title & Trust Co.* v. *Title Guaranty & Security Co.,* 224 U. S. 152; *Pine Hill Coal Co.* v. *U. S.,* 259 U. S. 191, 196; *Richelderfer* v. *Quinn,* 287 U. S. 315.

The lower court's interpretation would also result in placing an additional burden upon the Reconstruction Finance Corporation. It is, therefore, in conflict with the rule of construction that "a liability in any case is not to be imposed upon the Government without clear words", *Pine Hill Coal Co.* v. *U. S.,* 259 U. S. 191, 196, a principle which is carefully observed in construing statutes involving the waiver of constitutional immunity from taxation. As Mr. Justice Swayne said in *Austin* v. *The Aldermen of Boston,* 7 Wall. 694, 699:

> It is well settled that the States cannot exercise this authority [to tax] in respect to any of the instrumentalities which the General Government may create for the performance of its constitutional functions. It

> is equally well settled, that this exemption may be waived wholly, or with such limitations and qualifications as may be deemed proper, by the lawmaking power of the nation; *but the waiver must be clear, and every grounded doubt upon the subject should be resolved in favor of the exemption.* (Italics added.)

(B) *If any waiver of immunity from taxation of the shares involved in this proceeding may be implied from Section 5219, such waiver of immunity has been specifically withdrawn by Congress in Section 10 of the Act creating the Reconstruction Finance Corporation*

The lower court's decision fails to give effect to the specific expression of Congressional intent contained in Section 10 of the Act creating the Reconstruction Finance Corporation (47 Stat. 915, 15 U. S. C. A. § 610), to the effect that the Reconstruction Finance Corporation should be exempt from *all* State and local taxes, except as otherwise provided in Section 10. *Cf. Federal Land Bank* v. *Priddy, supra,* at pp. 233–235. That section constitutes, to use a phrase of Mr. Justice Sutherland, a "pertinent statutory exception" to the applicability of Section 5219. *Continental Illinois National Bank* v. *C. R. I. & P. R. R. Co.,* 294 U. S. 648. Section 10 provides in part that:

> The corporation, including its franchise, its capital, reserves, and surplus, and its income shall be exempt from *all* taxation now or

> hereafter imposed by the United States, by any Territory, dependency, or possession thereof, or by any State, county, municipality, or local taxing authority; except that any real property of the corporation shall be subject to State, Territorial, county, municipal, or local taxation to the same extent according to its value as other real property is taxed. (Italics supplied.)

and its broad scope is limited only by the express exception from tax immunity of the real property of the Corporation.[11]

The lower court held that Section 10 was a restatement of constitutional immunity and, therefore, had no effect upon the waiver of immunity from taxation contained in Section 5219. The court overlooks, however, that Section 10 is an ex-

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[11] Section 10 closely follows the wording of Section 7 of the Federal Reserve Act (1913), which reads as follows:

> **Exemption from taxation.** Federal reserve banks, including the capital stock and surplus therein, and the income derived therefrom shall be exempt from Federal, State, and local taxation, except taxes upon real estate. 38 Stat. 258, 12 U. S. C. A. 531.

That statute has been construed by the administrative departments of the Government in charge of its execution as exempting Federal Reserve Banks from all taxes other than taxes upon real estate. See rulings in 3 Federal Reserve Bulletin 931 (1917) and 4 Federal Reserve Bulletin 1215 (1918) in the appendix, pp. 30–31. These administrative interpretations, long adhered to, are entitled to great weight in construing Section 10 of the Reconstruction Finance Corporation Act. *U. S.* v. *Crecedo Compania*, 209 U. S. 337, 339; *Copper Queen Co.* v. *Arizona*, 206 U. S. 474, 479. A similar construction was also given to Section 10 by the then General Counsel for the Reconstruction Finance Corpora-

pression of a later Congressional intent in a specific field; i. e., with respect to the activities of the Reconstruction Finance Corporation. Even if Section 5219 could otherwise be applied to the Reconstruction Finance Corporation, Section 10 as a specific statute, subsequently enacted, would modify and limit the applicability of the inconsistent provisions of that statute (*Schick* v. *U. S.*, 195 U. S. 65, 68; *McKee* v. *U. S.*, 8 Wall. 163, 167).

CONCLUSION

Apart from Congressional consent, the shares of national bank stock held by the Reconstruction Finance Corporation are not subject to state taxation under the Federal Constitution, and such Congressional consent has not been given.

Respectfully submitted.

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tion. See Agency Counsel Bulletin No. 10, April 30, 1934, in the appendix, p. 31. This construction of the Act by the Agency in charge of its execution is entitled to great weight. *Federal Land Bank* v. *Warner*, 292 U. S. 53, 55.

APPENDIX

ACT OF MARCH 9, 1933

AN ACT To provide relief in the existing national emergency in banking, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Congress hereby declares that a serious emergency exists and that it is imperatively necessary speedily to put into effect remedies of uniform national application.

* * * * *

SEC. 304. If in the opinion of the Secretary of the Treasury any national banking association or any State bank or trust company is in need of funds for capital purposes either in connection with the organization or reorganization of such association, State bank or trust company or otherwise, he may, with the approval of the President, request the Reconstruction Finance Corporation to subscribe for preferred stock in such association, State bank or trust company, or to make loans secured by such stock as collateral, and the Reconstruction Finance Corporation may comply with such request. The Reconstruction Finance Corporation may, with the approval of the Secretary of the Treasury, and under such rules and regulations as he may prescribe, sell in the open market or otherwise the whole or any part of the preferred stock of any

national banking association, State bank, or trust company acquired by the Corporation pursuant to this section. The amount of notes, bonds, debentures, and other such obligations which the Reconstruction Finance Corporation is authorized and empowered to issue and to have outstanding at any one time under existing law is hereby increased by an amount sufficient to carry out the provisions of this section.

ACT OF MARCH 9, 1933, AS AMENDED AND SUPPLEMENTED

AN ACT To provide relief in the existing national emergency in banking, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Congress hereby declares that a serious emergency exists and that it is imperatively necessary speedily to put into effect remedies of uniform national application.

* * * * * *

SEC. 304. If in the opinion of the Secretary of the Treasury any national banking association or any State bank or trust company is in need of funds for capital purposes either in connection with the organization or reorganization of such association, State bank or trust company or otherwise, he may, with the approval of the President, request the Reconstruction Finance Corporation to subscribe for preferred stock in such association, State bank or trust company, or to make loans secured by such stock as collateral, and the Reconstruction Finance Corporation may comply with such request. *Noth-*

ing in this section shall be construed to authorize the Reconstruction Finance Corporation to subscribe for preferred stock in any State bank or trust company if under the laws of the State in which said State bank or trust company is located the holders of such preferred stock are not exempt from double liability. In any case in which under the laws of the State in which it is located a State bank or trust company is not permitted to issue preferred stock exempt from double liability, or if such laws permit such issue of preferred stock only by unanimous consent of stockholders, the Reconstruction Finance Corporation is authorized, for the purposes of this section, to purchase the legally issued capital notes or debentures of such State bank or trust company. The Reconstruction Finance Corporation may, with the approval of the Secretary of the Treasury, and under such rules and regulations as he may prescribe, sell in the open market the whole or any part of the preferred stock, capital notes, or debentures of any national banking association, State bank, or trust company acquired by the corporation pursuant to this section.[1] The amount of notes, bonds, debentures, and other such obligations which the Reconstruction Finance Corporation is authorized and empowered to issue and to have outstanding at any one time under existing law is hereby increased by an amount sufficient to carry out the provisions of this section. *As used in this*

[1] As amended by sec. 2 (a), (b), act approved Mar. 24, 1933 (Public, No. 4, 73d Cong.).

Regarding the sale by the Reconstruction Finance Corporation of preferred stock, capital notes, or debentures acquired by it, see sec. 5c of the Reconstruction Finance Corporation Act, as amended.

section, the term "State bank or trust company" shall include other banking corporations engaged in the business of industrial banking and under the supervision of State banking departments or of the Comptroller of the Currency.[2]

NATIONAL BANKING ACT (R. S., SECTION 5219)

SEC. 5219. The legislature of each State may determine and direct, subject to the provisions of this section, the manner and place of taxing all the shares of national banking associations located within its limits. The several States may (1) tax said shares, or (2) include dividends derived therefrom in the taxable income of an owner or holder thereof, or (3) tax such associations on their net income, or (4) according to or measured by their net income, provided the following conditions are complied with:

1. (a) The imposition by any State of any one of the above four forms of taxation shall be in lieu of the others, except as hereinafter provided in subdivision (c) of this clause.

(b) In the case of a tax on said shares the tax imposed shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State coming into competition with the business of national banks: *Provided,* That bonds, notes, or other evidences of indebtedness in the hands of individual citizens not employed or engaged in the banking or investment business and representing merely personal investments not made in competition with such business,

[2] As amended by sec. 2 (c), act approved Mar. 24, 1933 (Public, No. 4, 73d Cong.).

shall not be deemed moneyed capital within the meaning of this section.

(c) In case of a tax on or according to or measured by the net income of an association, the taxing State may, except in case of a tax on net income, include the entire net income received from all sources, but the rate shall not be higher than the rate assessed upon other financial corporations nor higher than the highest of the rates assessed by the taxing State upon mercantile, manufacturing, and business corporations doing business within its limits: *Provided, however,* That a State which imposes a tax on or according to or measured by the net income of, or a franchise or excise tax on, financial, mercantile, manufacturing, and business corporations organized under its own laws or laws of other States and also imposes a tax upon the income of individuals, may include in such individual income dividends from national banking associations located within the State on condition that it also includes dividends from domestic corporations and may likewise include dividends from national banking associations located without the State on condition that it also includes dividends from foreign corporations, but at no higher rate than is imposed on dividends from such other corporations.

(d) In case the dividends derived from the said shares are taxed, the tax shall not be at a greater rate than is assessed upon the net income from other moneyed capital.

2. The shares of any national banking association owned by nonresidents of any State, shall be taxed by the taxing district or by the State where

the association is located and not elsewhere; and such association shall make return of such shares and pay the tax thereon as agent of such nonresident shareholders.

3. Nothing herein shall be construed to exempt the real property of associations from taxation in any State or in any subdivision thereof, to the same extent, according to its value, as other real property is taxed.

4. The provisions of section 5219 of the Revised Statutes of the United States as in force prior to March 25, 1926, shall not prevent the legalizing, ratifying, or confirming by the States of any tax heretofore paid, levied, or assessed upon the shares of national banks, or the collecting thereof, to the extent that such tax would be valid under said section. (Act Mar. 25, 1926, c. 88; 44 Stat. L. 223.)

RECONSTRUCTION FINANCE CORPORATION ACT

SEC. 10. Any and all notes, debentures, bonds, or other such obligations issued by the corporation shall be exempt both as to principal and interest from all taxation (except surtaxes, estate, inheritance, and gift taxes) now or hereafter imposed by the United States, by any Territory, dependency, or possession thereof, or by any State, county, municipality, or local taxing authority. The corporation, including its franchise, its capital, reserves, and surplus, and its income shall be exempt from all taxation now or hereafter imposed by the United States, by any Territory, dependency, or possession thereof, or by any State, county, municipality, or local taxing authority; except that any real property of the corporation shall be subject

to State, Territorial, county, municipal, or local taxation to the same extent according to its value as other real property is taxed. (Act of Jan. 22, 1932, as amended, 49 Stat. 915, 15 U. S. C. A. § 610.)

FEDERAL RESERVE BULLETINS

Exemption from certain taxes.—The Commissioner of Internal Revenue has written the Federal Reserve Board that, in his opinion, Federal Reserve Boards are not subject to the tax upon charges for telephone, telegraph, and express service when such charges fall directly upon the Federal Reserve Bank. 3 *Federal Reserve Bulletin* (1917) 931.

* * * * *

War tax on currency shipment.—(To Federal Reserve Banks.) In connection with your absorbtion of the cost of shipping currency, there are quoted below inquiry received by the Board and response thereto:

> There is enclosed herewith a file on the subject of exemption of war tax on currency shipments to and from the Federal Reserve Banks.
>
> We shall be very glad to have some advice as to whether we should pay full express rates on shipments, or whether the Federal Reserve Bank will be considered as a department of the government justified to sign the exemption certificate provided.
>
> Reference is made to your letter of Nov. 13 regarding war tax on currency shipments to and from Federal Reserve Banks and file accompanying same.
>
> On page 931 of The Federal Reserve Bulletin for Dec. 1917, there was published an

opinion of the Commissioner of Internal Revenue. The Federal Reserve Banks are not subject to tax upon charges for telephone and telegraph and express service when such charges fall directly upon the Federal Reserve Bank. Nov. 21, 1918. (4 *Federal Reserve Bulletin* (1913) 1215.)

AGENCY COUNSEL BULLETIN

(The following are all the portions of Agency Bulletin No. 10, dated April 30, 1934, issued by the General Counsel of the Reconstruction Finance Corporation, that relate to State taxation of shares of preferred national bank stock owned by the Reconstruction Finance Corporation.)

There have been numerous requests for a statement of the policy of the Corporation in regard to the payment of state and federal taxes, by banks and trust companies in which it is financially interested. The variety of transactions involved and divergence in state laws may in some instances necessitate a modification of the generalization contained herein. It is believed, however, that this bulletin outlines a policy of wide applicability that will assist agency counsel in responding to specific inquiries. In case of doubt, agency counsel are invited to communicate with the Legal Division.

* * * * *

Section 5219 of the Revised Statutes, which governs state taxation of national banking associations and which has guided states in the taxation of state banks and trust companies, has developed two principal methods of state taxation: (1) taxation of shares, and (2) taxation according to net income.

(1) *Taxation of shares.* The tax upon shares of banks or trust companies is in some instances paid directly by shareholders. See, for example, Rhode Island, General Laws, 1923, Chapter 60. But more commonly it is paid, generally pursuant to statutory authority, by the bank or trust company on behalf of shareholders. For statutes of this class see *Boston* v. *Beale,* 51 Fed. 306 (1892), affirmed, 55 Fed. 26 (1893); *State* v. *State Trust and Savings Bank,* 31 N. M. 282, 245 Pac. 253 (1926); *Shippee* v. *Riverside Trust Company,* 113 Conn. 661, 156 Atl. 43 (1931); *Taylor* v. *Hale,* 186 Ark. 873, 56 S. W. 2d 428 (1933).

(a) *Owned by the Corporation.* The federal courts have frequently defined government agencies for purposes of tax immunity. *M'Culloch* v. *Maryland,* 4 Wheat. 316 (1819); *Clallam County* v. *U. S.,* 263 U. S. 341 (1923); *King County* v. *Fleet Corporation,* 282 Fed. 950 (1922); *U. S. Spruce Production Corporation* v. *Lincoln County,* 285 Fed. 388 (1922); *Fleet Corporation* v. *Delaware County,* 17 Fed. (2d) 40 (1927); and *Port Angeles Western Railroad Company* v. *Clallam County,* 20 Fed. (2d) 202 (1927). Under these decisions it appears that the property of the Corporation, which includes the shares of preferred stock it owns, is immune from taxation by any State, or political subdivision thereof, without congressional consent. Such consent was never given. Instead, Section 10 of the Reconstruction Finance Corporation Act, approved January 22, 1932, as amended, affirms the tax immunity of the Corporation by providing in part as follows:

> The Corporation, including the franchise, its capital, reserves, and surplus,

> and its income shall be exempt from all taxation now or hereafter imposed by the United States, by any Territory, dependency, or possession thereof, or by any State, county, municipality, or local taxing authority; * * *.

Nor can consent be found for shares of preferred stock in national banking associations, in Section 5219 of the Revised Statutes, since Section 10 of the Reconstruction Finance Corporation Act, as quoted above, expresses a later contrary congressional intent.

Therefore, no bank or trust company should pay this tax upon shares of preferred stock owned by the Corporation.

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STANLEY REED,
General Counsel.

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